IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8202 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SAGAR ENTERPRISE

Versus

ASSISTANT COMMISSIONER

Appearance:

MR KH KAJI for Petitioner

MR MIHIR JOSHI for MANISH R BHATT for Respondent

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE D.A.MEHTA

Date of decision: 26/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

#. The petitioner, a partnership firm has challenged in this petition a notice under Section 148 of the Income-tax Act, 1961 (hereinafter to be referred to as "the Act"), issued on 3rd October, 1997 for the assessment year 1991-92.

#. As the period of 4 years had elapsed from the end of the assessment year namely the assessment year 1991-92, the respondent was called upon by issuance of notice and subsequently affidavit-in-reply dated 10th December, 1997 has been filed along with the reasons recorded on 18th August, 1997. Rule was issued on 15th December, 1997.

#. When the matter came up for hearing earlier, it was submitted on behalf of the petitioner that the reasons recorded to the following effect are factually incorrect.

> "The assessee firm is engaged in the business of construction. The said firm came into existence vide partnership deed dated 1.10.1990. Therefore the relevant previous year for the firm for filing its first return of income would be 1.10.1990 to 31.3.1991. On perusal of the records it is noted that no return for A.Y. 91-92 has been filed by the assessee firm. As per explanation 2(a) to section 147 the following shall be deemed to be a case where income chargeable to tax has escaped assessment."

Therefore, Mr. Kazi, learned counsel appearing on behalf of the petitioner sought time to place on record the details about the filing of the return. Along with the affidavit-in-rejoinder, zerox copies of following documents have been annexed.

(i) Intimation dated 9th March, 1992 issued under Section 143(1)(a) of the Act.

(ii) Acknowledgment dated 28th August, 1991 of filing of return for the assessment year 1991-92.

(iii) Statement of income for the assessment year 1991-92.

At the time of hearing, originals of all the three documents have been produced for perusal of the Court.

#. On going through the reasons recorded and the documents which have been produced on affidavit, it is apparent that the reasons which are recorded are dehors the facts available on record. Mr. Mihir Joshi, learned

Standing Counsel appearing on behalf of the respondent stated that in para 2 of the reasons recorded, the respondent has also referred to action under Section 132 of the Act which was carried out at the premises of one Shri G.D. Shah in February, 1992, and has submitted that atleast that part of the reasons would survive vesting the respondent with jurisdiction to initiate and continue action under Section 147 of the Act.

#. On going through the entire reasons recorded, it can be seen that in the penultimate paragraph, the respondent has further recorded as under.

"Further, the assessee was required to file the return of the income for A.Y. 1991-92 which the assessee has failed. Moreover, it was the duty of the assessee to declare this transaction and to file the return of income for A.Y. 1991-92. The assessee has failed on both these counts. Therefore, the escapement of assessment of income is solely attributable to the assessee."

Therefore, it is apparent that the factor of non-filing of the return for the assessment year 1991-92 has overbearingly weighed with the respondent for arriving at the satisfaction about the failure on the part of the assessee and escapement of assessment of income. On the basis of the same, even for the sake of argument, if the the contention raised by Mr. Joshi is taken into consideration, the settled legal position is that in such circumstances, it would not be possible to say with certainty as to which factor would have weighed with the officer concerned and once it is shown that an irrelevant fact has been taken into consideration, to what extent the decision is vitiated would be difficult to say. On this count alone, the petition requires to be accepted.

#. However, there is one more aspect of the matter which requires to be taken into consideration. In the affidavit-in-reply, it is the say of the respondent himself that the said payment which is stated to be undisclosed income relevant for assessment year 1991-92 could have been made during the financial year 1991-91 relevant to assessment year 1992-93 and hence, "to cover up that probability, protective addition was made in assessment year 1992-93." Thereafter, in the affidavit-in-reply, the respondent has further stated thus:

"Hence, in the relevant case, addition of Rs. 17,98,500/- was made in A.Y. 92-93 on protective

basis and substantial addition was required to be made in A.Y. 91-92 and for that reopening u/s. 147 of the I.T.Act was initiated after recording reasons which are annexed hereto and marked Ann-I."

From the facts that have come on record, protective assessment for assessment year 1992-93 was carried in appeal by the assessee and on the assessee succeeding before the Commissioner (Appeals), the Revenue has filed Second Appeal before the Tribunal which is stated to be pending. It is pertinent to note that the first appellate authority decided the appeal for assessment year 1992-93 on 26th January, 1996 and the reasons have been recorded thereafter on 18th August, 1997.

#. Therefore, taking into consideration the totality of the circumstances and the facts which have come on record, it is apparent that the respondent himself is not sure as to the year of taxability and whether the said item requires to be taxed in assessment year 1991-92 or assessment year 1992-93. In such a situation, it is not possible to agree with the stand of the Revenue that any income could be stated to have escaped the assessment for assessment year 1991-92 as a consequence of any failure or omission on the part of the assessee.

#. The petition is therefore allowed. The impugned notice dated 3.10.97 (Annexure : B) is quashed and set aside. Rule is made absolute with no order as to costs.

[B.C. PATEL, J.] [D.A. MEHTA, J.]

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